No. 78-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF SOUTHERN RAILWAY COMPANY

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This reply brief is submitted in response to the briefs of respondents Seaboard Allied Milling Corp., *et al.* ("Allied Br."), respondents Board of Trade, *et al.* ("Board Br."), and *amici curiae* Potomac Electric Power Company, *et al.* ("Pepco Br.").

I. Respondents' Position Is Contrary to Settled Understanding and Practice Under the Interstate Commerce Act.

Since 1910, the Interstate Commerce Act has provided two different means for reviewing railroad rate changes: upon a new filing, the Commission has dis-

cretion to begin its own investigation of a new rate and suspend the rate for a limited period; where it chooses not to act, the shipper may file a complaint, obtain an adjudication, and appeal to the courts if dissatisfied with the Commission's determination.[1] Throughout this 70-year period, there has been no judicial review of refusals by the agency to suspend and investigate a newly filed tariff. The courts have (until the present case) uniformly declined to become involved unless and until the shipper exhausted his complaint remedy under the Act. Southern Br. 19, 22.

This established system of remedies represents a delicate legislative balance, and the *timing* of judicial intervention is a significant aspect of that balance.[2] Despite numerous revisions of the Act, Congress has never sought to alter the basic pattern,[3] and nothing has occurred to justify a judicial revision of the balance and the imposition of greater handicaps on railroad rate adjustments. On the contrary, the railroads' financial condition has worsened dramatically in recent years, partly because of the delays experienced

[1] The complaint procedure has been available since the original Act was passed in 1887. 24 Stat. 383. The suspension and investigation power was established in the Mann-Elkins Act of 1910. 36 Stat. 552.

[2] *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 664-68 (1963); *United States* v. *SCRAP*, 412 U.S. 669, 697-98 (1973).

[3] Congress has several times extensively revised the Act in other respects (*e.g.*, the Transportation Act of 1920, 41 Stat. 474, the Transportation Act of 1940, 54 Stat. 898, and the 4-R Act of 1976, 90 Stat. 31).

by the railroads in obtaining desperately needed rate relief.[4]

Judicial intervention directed against rate adjustments, before administrative remedies are exhausted, would represent a step in exactly the wrong direction. Administrative proceedings would be made more complicated and prolonged, at a time when Congress has shown increasing concern that the Commission speed the completion of proceedings. See Southern Br. 32. The courts, already heavily burdened, would have to superintend a new layer of judicial review at a preliminary stage of the process. The railroads would be threatened with interim relief delaying lawful rates and further impairing the carriers' financial condition. These concerns are not speculative: they are grounded in experience.[5]

If the courts once begin to review refusals to suspend and investigate, a proliferation of such cases is inevitable. While Seaboard Allied argues that Section 4 claims present a special basis for judicial review in advance of complaint proceedings (Allied Br. 32-34), the Board of Trade argues that alleged Section 2 violations warrant early intervention (Board Br. 9-10,

[4] In 1978, the railroads' return on net investment was approximately 1.62 percent. See *Traffic World*, April 9, 1979, p. 178. By contrast, the ICC recently estimated that the railroads' cost of capital is now 10.6 percent. *Ex Parte No. 353*, served December 5, 1978, p. 39.

[5] For example, in the *SCRAP* litigation, a lower court's attempt to review the ICC's refusal to suspend an emergency rate adjustment resulted in an injunction by the lower court delaying a portion of the adjustment for many months. Although this Court ultimately vacated the injunction, the railroads suffered millions of dollars of irreparable revenue losses in the meantime.

19); and the Pepco brief in substance urges that any type of violation should be reviewable at the investigation and suspension stage (Pepco Br. 10-11). In fact, if judicial review were introduced prior to exhaustion of complaint remedies, the further question of *when* review should occur would itself become a fruitful source of wasteful litigation.

Under present law, clear-cut rules determine when and how courts should intervene in rate controversies. Refusals of the ICC to suspend and investigate are not directly reviewable; and review of rates is available only after the shipper exhausts his remedies under the complaint procedures of the Act. Under this regime, court controversies are deferred and, in many instances, avoided entirely. When rate issues do reach the courts, there is a complete administrative record and a full agency decision on the merits. This regime for review is readily understandable and easily administered, and it has operated successfully for many years. Congress has not seen fit to change it. It is against this background that the arguments of respondents, who seek to persuade this Court to alter drastically the existing system, must be judged.

II. Seaboard Allied's Claim of Section 4 Departures Provides No Basis for Avoiding Complaint Remedies.

Seaboard Allied's principal argument for immediate review rests upon inferences drawn from Section 4 of the Act, its alleged unique character, and the legislative history and precedents pertaining to it. That section prohibits a carrier, without permission from the Commission, from charging more for a short haul included in a longer route than for a haul covering the

longer route. There is no reason why shipper claims of Section 4 violations should be afforded special treatment or exempted from the ordinary exhaustion of remedies requirements.

While rates violating Section 4 without Commission approval may be "unlawful" (Allied Br. 29), they are neither more or less so than rates that are unreasonably high under Section 1(5), unreasonably discriminatory under Section 2, or unreasonably prejudicial under Section 3. If the Commission declines to begin its own investigation of an allegedly unlawful rate under Section 15(8) procedures, a disappointed shipper is free to obtain an adjudication of the rate by filing a complaint under Section 13(1). Such complaints clearly may embrace Section 4 violations,[6] and nothing in Section 4 warrants judicial review of an alleged violation until there is an adjudication of the complaint by the Commission.

Seaboard Allied suggests that the Commission's action in this case amounts to an "authorization" of the rate (Allied Br. 29, 34), but nothing could be further from the truth. No prior approval of a carrier filed tariff is required under the Act; the Commission refusal to suspend and investigate is not an approval of the tariff; and the agency may subsequently find such a rate unlawful in a complaint proceeding and award reparations for any damage done to the shipper. See Southern Br. 14. In arguing that the rate was "authorized," Seaboard Allied is merely reiterating the error committed by the lower court.

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[6] Section 13(1) embraces complaints of "anything done" by a carrier in violation of the "provisions" of the Act. See also Southern Br. 14, providing citations.

Respondents next argue that judicial intervention at the suspension and investigation stage is compelled by a unique Congressional concern with Section 4 violations. In fact, there is no evidence that Congress takes any violation of the Act more or less seriously. The legislative history on which Seaboard Allied relies was not addressed to the *timing* of judicial review; it concerned the substantive standard by which rates are to be judged under Section 4 and that substantive standard is unrelated to the stage at which judicial review may occur.[7]

Seaboard Allied is also mistaken in relying upon the waiver provision of Section 4, which allows a carrier to seek a Commission waiver of the section. Allied Br. 29. That waiver provision applies where a carrier concedes or assumes the existence of a violation and asks the Commission to grant a waiver of Section 4. No such concession was made, or waiver sought, in the present instance. This case is simply one in which a shipper alleged and carriers denied a violation of the Act, and Section 13(1) provides the shipper with an administrative remedy to secure a determination of that issue.

Nor is Seaboard Allied's position supported by cases which involve the review of decisions by the Commission to grant waivers under Section 4. Allied

[7] The original 1887 language of Section 4 outlawed long and short haul differentials only "under substantially similar circumstances." 24 Stat. 380. So wide a variety of circumstances were held to constitute dissimilar conditions that "after 1897 the Commission proceeded, for the most part, as if the Fourth Section had been completely eliminated from the Act." 1 I. Sharfman, *The Interstate Commerce Commission* 28 (1931). Congress ultimately remedied the situation by deleting the qualifying language.

Br. 30. Such decisions represent agency resolution of the merits of a controversy, *i.e.*, whether the carrier meets the substantive conditions for granting waivers under Section 4. If the Commission's decision stands, there is no complaint remedy available, since the Section 4 requirement has been waived. Here, no waiver is involved and Seaboard Allied is free to file a complaint and obtain an adjudication of the alleged violation.

Finally, Seaboard Allied asserts that Section 4 creates specific standards, that there is thus "law to apply" on judicial review of the Commission's action, and that the exception for discretionary agency action is therefore not applicable. Allied Br. 36, citing *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). This argument, however, misstates the Commission "action" sought to be reviewed in this case. The Commission here has not decided any Section 4 matter on the merits but has merely determined to forego a Section 15(8) investigation, remitting shippers to their complaint remedy. That "action" is not governed by statutory standards but is a discretionary decision respecting the agency's own internal processes and enforcement procedure.[8]

III. The Board of Trade's Claim of Discrimination Does Not Justify Review and the Relief Sought Is Improper.

The Board of Trade argues that the tariff was unlawful not because of alleged Section 4 violations but

[8] Under the Act, the shipper is entitled to a lawful rate on his shipment; but he certainly has no right to dictate to the Commission that it decide this issue in a Section 15(8) investigation rather than in a complaint proceeding under Section 13(1). See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

for an entirely different reason. It asserts that exempting shipper supplied cars from the temporary increase constituted unlawful discrimination under Section 2 and other provisions of the Act. Board Br. 7-15. Such discrimination, it says, rendered the tariff "plainly violative" of the Act and required the Commission to hold the tariff unlawful. *Id.* at 15-17.

Section 2, the discrimination provision most relevant to such a claim,[9] creates no abstract and rigid rule that all shipments between two points must move at the same rate: it precludes different charges for a "like and contemporaneous service" involving "a like kind of traffic" under "substantially similar circumstances." Whether services or traffic are "like" and whether circumstances are "substantially similar" present precisely the types of issues long recognized to invoke the Commission's expert judgment and require an appraisal of the specific facts.[10] There was certainly no "settled" or "clearly established" violation in this case. Board Br. 10, 15.

Clearly, the Commission could hold in a complaint proceeding that the provision of cars by one group of shippers renders the "circumstances" pertaining to

[9] Board of Trade's citations of Section 3(1) of the Act and Section 1 of the Elkins Act, 49 U.S.C. § 41, are even more mistaken. Section 3, prohibiting unreasonable preferences or prejudice, is triggered only where each of several well defined circumstances is established, including "competitive injury" to the complaining shipper. See, *e.g.*, ***Chicago & E.I.R.R.*** v. ***United States,*** 384 F. Supp. 298, 300-01 (N.D. Ill. 1974), ***aff'd per curiam,*** 421 U.S. 956 (1975). The Elkins Act provision is a criminal statute directed primarily at rebates and failure to file or enforce tariff rates.

[10] See, *e.g.*, ***United States*** v. ***ICC,*** 352 U.S. 158, 175-76 (1956); ***Barringer & Co.*** v. ***United States,*** 319 U.S. 1, 6 (1943).

their traffic not "substantially similar" to shippers requiring carrier supplied cars.[11] The carriers might also argue that seasonal rates aim in part to improve car supply and that the impact of applying the increase to shipper supplied cars is not necessarily the same.[12] Whatever conclusion the Commission might ultimately reach after a full hearing, there is certainly no "patent" violation of the Act, as the Board of Trade contends.

In any event, the complaint remedy under Section 13 provides a clear avenue for relief, whether an asserted violation is "patent" or otherwise. Nothing in the Act confines that remedy to hard or doubtful cases or excuses its use because of the shipper's enthusiasm for his position. One would expect the complaint remedy to be even swifter and more effective in the case of a clear violation, and respondents' failure to use that remedy here invites the inference that their confidence in their claim may be somewhat less sure than their rhetoric suggests.

Nothing could be more unsound than to make the timing of judicial review turn on whether an alleged violation is assertedly patent. In this case, the Board of Trade asserts that unlawful discrimination is clearly established; and the railroads deny any such violation whatsoever. The substantive law is difficult enough to apply without appending, as a test of jurisdiction, the further question of whether the violation is clear or

[11] If the circumstances are dissimilar, then Section 2 is by its terms inapplicable regardless of whether shipper allowances are afforded. Compare Board Br. 9-10.

[12] One of the objects of seasonal adjustments is to alleviate peak demand for the railroads' cars. See Southern Br. 6, n.12.

merely debatable. The time spent arguing about the clarity of violations can far better be spent in a complaint proceeding under Section 13, where the Commission can develop a full record and decide the issue on the merits.

The concluding difficulty with the Board of Trade's argument is demonstrated in its prayer for relief. Having argued that the tariff was patently unlawful, the Board of Trade naturally asserts that the further investigation ordered by the lower court is unnecessary and mistaken; instead, its own argument leads it to conclude that the lower court should have declared the tariff unlawful and directed immediate refunds. This explicit attempt to impeach the judgment below is impermissible, since the Board of Trade did not cross-petition for certiorari.[13]

IV. None of the Remaining Claims or Citations of Respondents Is Persuasive.

Apart from claims based on Section 4 and the discrimination provisions of the Act, respondents and *amicus* Pepco offer a medley of miscellaneous contentions and citations said to support the decision below. Seaboard and Pepco both argue that complaint remedies are inherently inadequate and therefore need not be exhausted. Allied Br. 40-45; Pepco Br. 26-27, 34-36. In fact, the Section 13 complaint remedy has been widely used for almost a century and has afforded ample relief to shippers in repeated cases. It would therefore require a remarkable showing to have the

[13] *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n. 4 (1970).

Court declare inadequate the oldest and most familiar means established for resolving rate disputes.[14]

Seaboard Allied's main objection is that it is burdensome for shippers to pursue multiple complaint cases, but nothing prevents a number of shippers from joining in a complaint case or precludes consolidation of like complaints involving the same tariff. Nor are complaint proceedings likely to produce inconsistent results, as Seaboard Allied suggests (Allied Br. 41); such cases are considered by a single agency, and there is no basis for expecting the Commission to reach inconsistent results in evaluating the same tariff even if more than one proceeding does occur. The fact that carriers collect rates in the meantime is also no argument that the complaint remedy is inadequate (Allied Br. 42), because retrospective damages are available where the shipper is damaged by a violation of the Act. See Southern Br. 14.[15]

Seaboard and Pepco also claim that Commission complaint proceedings are not completed swiftly enough (Allied Br. 41), Pepco purporting to illustrate this claim with unrepresentative facts from a single complex case. Pepco Br. 16. However, the substantive issues to be tried are the same, whether a rate is challenged under Section 15(8) or 13(1); and the introduction of a new stage of judicial review *before* a Commission de-

[14] Congress' recodification of the Act, which became effective less than a year ago, continues to retain the complaint remedy. 49 U.S.C. § 11701.

[15] Violations of Section 4 frequently serve as the basis for an award of reparations in a complaint proceeding. *E.g.*, *New Process Gear Corp.* v. *N.Y. Central R.R.*, 281 I.C.C. 701, 704 (1951); *Vinci* v. *Cleveland, C & St. L. Ry.*, 147 I.C.C. 250, 252 (1928).

cision on the merits will—as it has here—delay rather than sp[illegible]d the ultimate decision.[16]

Next, *amicus* Pepco argues that the codification of the Interstate Commerce Act, adopted in 1978, overruled the *Arrow* doctrine and clarified statutory provisions allegedly favoring immediate review of refusals to suspend and investigate. Pepco Br. 15, 16-19. Nothing in the statute or Pepco's description of it supports either contention.[17] In any event, the recodification statute is unusually explicit in providing that it is intended to restate existing laws "without substantive change" and that the recodified language "may not be construed as making a substantive change in the laws replaced." [18]

Pepco further argues that the exercise of agency "discretion" does not automatically foreclose review. Pepco Br. 21-23. However, discretion *can* foreclose review, as the APA clearly provides (see Southern Br. 21); and the pertinent question is whether it does so here. In this case, the discretionary decision involves the agency's choice of procedural routes; the refusal to begin a Section 15(8) investigation does not adjudicate any substantive rights of the shipper to a lawful rate; and the Section 13 complaint remedy remains

[16] Congress in Section 303 of the 4-R Act (90 Stat. 48) enacted provisions designed to speed Commission processes.

[17] The provisions cited by Pepco appear for the most part to have nothing to do with the present issue of review of refusals to suspend or investigate. *E.g.*, 49 U.S.C. § 10324 (effective date of ICC order), § 10709 (market dominance).

[18] 92 Stat. at 1466. The legislative history confirms this intention; and it would be inferred, under this Court's precedents, even if the statute and legislative history were otherwise silent. See Southern Br. 2, n. 2.

available to secure such an adjudication of the rate and judicial review. In these circumstances, the discretionary enforcement decision here involved, made at an intermediate state in the rate-making process, is not subject to review.

Finally, several decisions cited by respondents deserve brief comment. In *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978), this Court considered whether the Commission had authority to suspend initial rates for a new service, a class of rates which the carriers alleged to be beyond the Commission's suspension authority. The Court noted that review involved no appraisal of rates and was for the "limited" purpose of assuring that the Commission did not exceed its suspension authority. 436 U.S. at 638-39 n.17. Here, by contrast, the Commission has not exercised any suspension authority, let alone exceeded jurisdictional bounds, but has merely declined to investigate until shippers exercise their complaint remedies. In further contrast, the type of review sought in this case would not avoid premature appraisal of rates by the courts, but would involve the courts in just such an exercise.[19]

Even less need be said about the other cases cited by respondents. Unlike the tariff at issue in *United Gas,*[20]

[19] This is amply shown by the lower court's decision here, which is clearly premised on an initial evaluation of the lawfulness of the rates prior to any Commission decision (A. 312-13). Similarly, respondents' briefs in this Court are largely an attempt to persuade this Court that the rates are unlawful on various grounds.

[20] *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956). That case turned upon the unusual characteristic of regulation under the Federal Power Act by which contract rates are a central element of rate-making and prior contracts may preclude subsequent tariff changes. Compare *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908).

the seasonal rate adjustment here involved—filed under a statute expressly contemplating such changes (see Southern Br. 6)—is not a "substantive nullity." Nor are respondents helped by selective service cases (see Board Br. 17) where no further administrative remedies remained to be exhausted. Finally, their briefs repeatedly cite cases where an agency has definitively decided the merits of a controversy (see, *e.g.*, *Atchison, T.&S.F.Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), cited at Board Br. 17), but the hallmark of the Commission's action in this case is that the agency has not yet decided the merits and complaint remedies to resolve the merits remain available.

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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